Supreme Court, U. S.
FILED
SEP 10 1979
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-399

CINCINNATI BENGALS, INC. and
CHARLES "BOOBY" CLARK,
Petitioners,

vs.

DALE HACKBART,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The petitioners, Cincinnati Bengals, Inc. and Charles "Booby" Clark, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit ("the Court of Appeals") entered in this proceeding on June 11, 1979.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, is attached hereto as Appendix A (A1-A20). The opinion of the United States District Court for the District of Colorado ("the District Court") is reported at 435 F.Supp. 352 (D.Colo. 1977) and is attached as Appendix B (A21-A35).

JURISDICTION

The judgment of the Court of Appeals was entered on June 11, 1979, and this Petition is filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals decision conflicts with controlling state law and statutes of limitations applicable to this case.

2. Whether the Court of Appeals decision demonstrates such a complete misapprehension of the trial court proceedings and such a departure from the usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

3. Whether the Court of Appeals adopted a standard of relevance under the Federal Rules of Evidence which was clearly erroneous and which indicates a serious misunderstanding of the trial court proceedings.

STATUTORY PROVISIONS INVOLVED

Colo. Rev. Statutes §13-80-102:

Actions barred in one year. All actions for assault and battery, false imprisonment, slander, and libel shall be commenced within one year after the cause of action accrues, and not afterwards.

Colo. Rev. Statutes §13-80-110:

Actions barred in six years. Except as otherwise provided in section 4-2-725, C.R.S. 1973, the following

actions shall be commenced within six years after the cause of action accrues, and not afterwards:

(a) All actions of debt founded upon any contract or liability in action;

(b) All actions upon judgments rendered in any court not being a court of record;

(c) All actions for arrears of rent;

(d) All actions of assumpsit, or on the case founded on any contract or liability, express or implied;

(e) All actions of waste and for trespass upon land;

(f) All actions of replevin, and all other actions for taking, detaining, or injuring goods or chattels;

(g) All other actions on the case, except actions for slander and for libel.

STATEMENT OF THE CASE

On September 16, 1973, the Cincinnati Bengals, a petitioner herein, played the Denver Broncos in the opening game of the National Football League ("NFL") season. Dale Hackbart, a defensive back for the Broncos, was assigned to "cover" Charles Clark, a Bengals running back, on a Bengals pass play. When the pass was thrown toward Clark, a Broncos player intercepted and began running upfield. At that point, the offensive and defensive roles of Hackbart and Clark changed. Hackbart became an "offensive" player whose responsibility was to block Clark and prevent him from tackling the Broncos ball carrier; Clark, on the other hand, was obliged to "ward off" Hack-

bart's block and attempt to tackle the Broncos player running upfield.

In his attempt to "block" Clark, Hackbart threw his forearm at Clark and hit him in the chest and chin areas. Reacting instinctively, Clark in turn struck Hackbart with his forearm in the shoulder and helmet areas. The two players fell to the ground and the play ended moments later. The incident was not unusual or noteworthy in NFL competition; although both players were probably involved in infractions of the playing rules, no penalty was called by the officials. Hackbart and Clark did not exchange words at the time, and neither player discussed the incident with his teammates. Hackbart played for the balance of the game and for two subsequent Broncos games before retiring[1] from professional football.

Almost two years later, Hackbart filed his Complaint in this case against the Bengals and Charles Clark, alleging that he had been injured in the 1973 game and purporting to state a claim against the petitioners for assault and battery. The jurisdiction of the District Court was invoked pursuant to 28 U.S.C. §1332 because of diversity of citizenship, the plaintiff being a citizen of Colorado and the defendants being citizens of Ohio.

The District Court dismissed Hackbart's assault and battery claim because it was barred by the applicable statute of limitations in Colorado. Subsequently, a Second Amended Complaint was filed. The factual allegations in the Second Amended Complaint were identical to those in the first Complaint, but recovery was sought under several new theories of law.

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1. Respondent Hackbart was placed on waivers later in the season because of his age. At the time of his retirement, there was no mention of any injury received during the Bengals game or any other contest.

The trial of the case was bifurcated by agreement of the parties, and the District Court held a full evidentiary hearing on the issue of liability. The District Court found that the physical contact which gave rise to this action was a common and frequent characteristic of professional football which could be expected to take place in virtually any NFL game. (A26-A27). Moreover, the trial court found that Hackbart, who was himself an aggressive participant in the NFL for 13 years, clearly recognized and assumed the risk of injury from such physical contact. (A29) In accordance with established tort law in Colorado, the District Court concluded that Hackbart's assumption of risk precluded recovery, and final judgment was entered in favor of the Bengals and Clark.

On June 11, 1979, the Court of Appeals reversed the District Court and remanded the case. Although the District Court's jurisdiction over the case had never been questioned by the parties or by the court, and although the District Court clearly exercised full jurisdiction in disposing of the case as described above, the Court of Appeals evidenced a fundamental misunderstanding of the trial court proceedings by holding, *inter alia*, that it was error for the trial court to have declined jurisdiction. (A8-A14) This and other errors by the Court of Appeals form the basis for this Petition.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals Decision Conflicts With Controlling Law in Colorado and Applicable Statutes of Limitations.

As noted above, this case was commenced as a claim for an alleged battery. The District Court dismissed the claim because it was barred by the applicable statute of

limitations in Colorado, which provides that such cases must be commenced within one year after the cause of action accrues. Colo. Rev. Statutes §13-80-102. Plaintiff's Second Amended Complaint alleged the same facts but sought recovery under several different legal theories, including reckless disregard for plaintiff's safety.

A full trial on the merits was conducted by the District Court, the Honorable Richard P. Matsch presiding, without jury. After trial, the court issued its judgment and opinion in favor of defendants, including extensive findings of fact and conclusions of law.

The evidence demonstrated clearly that the incident involved was a common occurrence in—indeed, a characteristic of—professional football. It was also shown that the plaintiff was well aware of the risks involved in such competition, and judgment was accordingly entered for defendants. Because of its extensive findings of fact concerning plaintiff's assumption of risk, the District Court did not address the issue of whether the claims set forth in plaintiff's Second Amended Complaint were barred by the statute of limitations.

In reversing the trial court decision, the Court of Appeals briefly discussed the statute of limitations issue and erroneously held that a limitation period of six years was applicable to causes of action for "recklessness." (A16-A17) This holding is in direct conflict with controlling Colorado case law and is a serious misapplication of the Colorado statutes involved.

The pertinent statutes are set forth below in their entirety:

Colo. Rev. Statutes § 13-80-102:

Actions barred in one year. All actions for assault and battery, false imprisonment, slander, and libel

shall be commenced within one year after the cause of action accrues, and not afterwards.

Colo. Rev. Statutes §13-80-110:

Actions barred in six years. Except as otherwise provided in section 4-2-725, C.R.S. 1973, the following actions shall be commenced within six years after the cause of action accrues, and not afterwards:

(a) All actions of debt founded upon any contract or liability in action;

(b) All actions upon judgments rendered in any court not being a court of record;

(c) All actions for arrears of rent;

(d) All actions of assumpsit, or on the case founded on any contract or liability, express or implied;

(e) All actions of waste and for trespass upon land;

(f) All actions of replevin, and all other actions for taking, detaining, or injuring goods or chattels;

(g) All other actions on the case, except actions for slander and for libel.

At trial, there was no dispute that Charles Clark struck Hackbart deliberately, but without specific intent to injure. The trial court's findings of fact confirmed this. (A23) Under these circumstances, it is clear under Colorado law that the applicable period of limitation is one year, as set forth in section 13-80-102, quoted above. The issue was conclusively decided in *Maes v. Tuttoilmondo*, 31 Colo. App. 248, 502 P.2d 427 (1972). In *Maes*, plain-

tiff sued to recover for injuries received as a result of a fight with defendant. Because the limitation period for assault and battery had expired, plaintiff's complaint recited that defendant had "negligently and recklessly" inflicted the blow which caused plaintiff's injuries. The record showed, however, that defendant had deliberately hit plaintiff, but without any specific intent to injure him. The trial court granted summary judgment for the defendant, holding that the statute of limitations for assault and battery was controlling. The Colorado Court of Appeals affirmed, holding that the statute of limitations for an obvious battery could not be avoided by portraying a deliberate striking as negligence or "reckless misconduct."

The recent pronouncement by the Colorado state courts in *Maes* is not distinguishable from the case at bar. The plaintiff in this case has attempted to do exactly what the Colorado state courts forbade in *Maes*; i.e., he has attempted to characterize an obvious assault and battery case as a claim for "recklessness" in order to circumvent the statute of limitations for assault and battery. The respondent's avoidance of the proper limitation period was particularly prejudicial in the case at bar because important evidence had been destroyed before the action was commenced. If the suit had been timely filed, this evidence (additional game films) would have been available and could have been helpful in the petitioners' defense of the case.

Clearly, the Court of Appeals was obliged to follow Colorado law in this diversity case. *Commissioner v. Bosch*, 387 U.S. 456 (1967); *Fidelity Union Trust Co. v. Field*, 311 U.S. 169 (1940). The origin of this fundamental principle is found in this Court's landmark decision in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). The function of the federal courts in diversity cases was stated clearly by this

Court in *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941), as follows:

> "[T]he proper function of the . . . federal court is to ascertain what the state law is, not what it ought to be."

In the case at bar, the controlling state law precludes any recovery by Hackbart because of the expiration of the applicable limitation period. Although the issue was briefed and argued extensively, the Court of Appeals failed to acknowledge the existence of the controlling *Maes* case and chose instead to apply a statute of limitations which has no application whatsoever in this case.[2] The Court of Appeals decision on this issue is in direct conflict with Colorado law and represents an unwarranted departure from this Court's pronouncements in *Erie* and its progeny.

2. The Court of Appeals Decision Indicates a Complete Misunderstanding of the Trial Court Proceedings and Represents Such a Departure From the Usual Course of Judicial Proceedings As to Call for an Exercise of This Court's Power of Supervision.

In almost every respect, the Court of Appeals' reversal indicates a total misapprehension of the trial court's disposition of the case. The misapprehensions appear to have been so fundamental that they seriously affected the court's ability to render a meaningful review of the District Court decision.

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2. The statute of limitations cited by the Court of Appeals, quoted verbatim at pages 6-7, *supra*, applies to several specific causes of action, none of which resembles this action in any way, and to actions on the case other than slander or libel. Clearly, this is not an action on the case in any sense of the phrase. *See generally* 1 C.J.S., *Actions* §36 at 1078 (1972); W. Prosser, Law of Torts §7 (4th Ed. 1971).

First, it appears that the Court of Appeals believed, for some inexplicable reason, that the District Court declined to assume jurisdiction over the case. (See Court of Appeals slip opinion, A8-A14) Nothing could be further from the truth. The District Court conducted a full trial on the merits and made extensive findings of fact and conclusions of law, all aimed at the following holding:

> "Upon all of the evidence, my finding is that the level of violence and the frequency of emotional outbursts in NFL football games are such that Dale Hackbart must have recognized and accepted the risk that he would be injured by such an act as that committed by the defendant Clark on September 16, 1973. Accordingly, the plaintiff must be held to have assumed the risk of such an occurrence. Therefore, even if the defendant breached a duty which he owed to the plaintiff, there can be no recovery because of assumption of the risk." [435 F.Supp. at 356]

In keeping with these findings and conclusions, which were well supported by the evidence and applicable Colorado law, final judgment was entered in favor of the defendants. There was no holding by the District Court that jurisdiction should not be assumed, and the Court of Appeals' misunderstanding of this issue clearly affected its review of the case.

Second, the Court of Appeals indicates that "The cause [for recklessness] has not been tried on its merits. . . ." (A17) Once again, the court's understanding is totally incorrect, as evidenced by the explicit discussion of the trial court in its opinion. In its opinion (A27-A28), the District Court analyzed all of plaintiff's theories of recovery, *including the claim for reckless misconduct as described by the Restatement of Torts*, and correctly concluded that

the reckless misconduct theory is subject to the recognized defenses of consent and assumption of risk in Colorado. Thereafter, the court carefully analyzed the facts and applicable law and concluded that judgment should issue for defendants. Thus, the trial court's opinion demonstrates on its face that the "reckless misconduct" claim was indeed tried on its merits and resolved in favor of defendants. It is not clear how the Court of Appeals could have misunderstood this aspect of the case, but it is clear that the misunderstanding affected its ability to conduct a meaningful review of the case.

A third indication of the Court of Appeals' misunderstanding of the District Court's disposition of the case pervades the entire opinion. At the outset of the slip opinion, the appeals court states:

> "In essence the trial court's reasons for rejecting plaintiff's claim was (sic) that professional football is a species of warfare and that so much physical force is tolerated and the magnitude of the force exerted is so great that it renders injuries not actionable in court; that even intentional batteries are beyond the scope of judicial process." [A2]

This characterization of the trial court opinion is fundamentally inaccurate, as appears on the face of the trial court's opinion. Judge Matsch did not hold that professional football players were immune from civil liability for wrongful conduct; nor did he rule that all intentional batteries on the field are "beyond the scope of judicial process." The trial court simply recognized that intentional striking is an integral part of the game and that traditional notions of assault and battery could not be employed without consideration of whether the plaintiff

had consented to such contacts or assumed the risk of injury therefrom.[3]

Inexplicably, the Court of Appeals ignored the consent and assumption of risk issues altogether although these issues were the single most important aspect of the case. In fact, the Court of Appeals makes the incredible statement that "there are no principles of law which allow a court to rule out certain tortious conduct by reason of general roughness of the game or difficulty or (sic) administering it." (A7) In the context of this case, this statement by the Court of Appeals has the effect of abrogating consent and assumption of risk as defenses in Colorado. It is ludicrous to suggest, as the Court of Appeals has held, that assumption of risk does not apply to the inherent physical roughness of professional football. In this respect, the Court of Appeals' reversal of the trial court offends all logic and abrogates a considerable body of common law in Colorado.

By failing to allow for the obvious fact that football by its nature is characterized by constant "assault and battery" behavior, the Court of Appeals so far departed from reasonable judicial consideration of this case as to justify an exercise of this Court's power of supervision. More important, the Court of Appeals' unilateral abrogation of assumption of risk and consent as recognized defenses in Colorado represents another unwarranted "reversal" of controlling state law. The evidence demonstrated (and the trier of fact found) that physical contact such as the incident involved in this case was an ordinary

3. The trial court stated the issue this way: "Both theories of liability are also subject to the recognized defenses of consent and assumption of the risk. Here the question is what would a professional football player in the plaintiff's circumstances reasonably expect to encounter in a professional contest?" (A28)

and usual occurrence in professional football, that Dale Hackbart understood this and appreciated the risks inherent in such activities, and that he knowingly exposed himself to such risks by continuing to play professional football. Under Colorado law, these facts describe a classic case of assumption of risk.[4] Moreover, it is also well established in Colorado that the question of assumption of risk is not a question for the court to determine as a matter of law, but for the finder of facts to determine from the evidence in the case. The rule in Colorado was well stated by the Colorado Supreme Court in *United Brotherhood of Carpenters and Joiners of America v. Salter*, 114 Colo. 513, 167 P.2d 954, 958 (1946):

> "Where the evidence is sufficient to raise a question as to plaintiff's knowledge and prudence, the determination [of consent or assumption of risk] must be submitted to the jury or other trier of facts."

See also Seward v. York, 124 Colo. 512, 239 P.2d 301 (1951) and cases cited therein. Under these well established principles of Colorado law, there is no justification whatsoever for setting aside the trial court's findings of fact in this case.

Notwithstanding the overwhelming evidence in the case and the trial court's well supported findings of fact, and notwithstanding the absence of ambiguity in Colorado state law on the subject, the Court of Appeals appears to have abrogated the assumption of risk defense completely. Its disposition of the case in this regard constitutes a conflict with state law, an unwarranted usurpation of

4. *Cox v. Johnston*, 139 Colo. 376, 339 P.2d 989 (1959); *Barker v. Colorado Region—Sports Car Club of America, Inc.*, 35 Colo. App. 73, 532 P.2d 372 (1974); *Eisenhart v. Loveland Skiing Corp.*, 33 Colo. App. 120, 517 P.2d 466 (1973).

the trial court's fact-finding function,[5] and such a departure from the usual and proper course of judicial proceedings as to call for an exercise of this Court's power of supervision.

3. The Court of Appeals Adopted a Standard of Relevance Under Rules 401 and 404, Federal Rules of Evidence, Which Was Clearly Erroneous and Which Evidences a Serious Misunderstanding of the Trial Court Proceedings.

A major focus in the trial of this case was the issue of consent or assumption of risk. The issue can be plainly stated as follows: Did Dale Hackbart, as a professional football player with 13 years of experience in the NFL, assume the risk that he might be injured by physical contact such as the contact involved in this lawsuit? In an effort to show that Hackbart knew and understood these risks, petitioners relied upon the testimony of a number of witnesses who were knowledgeable about professional football. Witnesses stated that the contact between Hackbart and Clark which gave rise to this lawsuit was not extraordinary in NFL competition. Most witnesses agreed that this kind of contact was in fact common, even though the incident probably involved infractions of the playing rules by both Hackbart and Clark. To shed further light on plaintiff's personal knowledge of the game, petitioners introduced evidence, including motion pictures, demonstrating that the plaintiff himself had engaged in similar activities on many occasions over the years and

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5. Rule 52(a) of the Federal Rules of Civil Procedure expressly provides, and this Court has consistently held, that district court findings of fact should not be set aside unless clearly erroneous. *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 339 U.S. 605, 609-610 (1950); *United States v. Yellow Cab Co.*, 338 U.S. 338, 341-342 (1949).

that he indeed had a history of being the aggressor in such situations.

These facts were clearly relevant for the trier of fact in determining whether plaintiff assumed the risk of, or impliedly consented to, such contacts by participating in professional football with full knowledge of the obvious risks involved. Remarkably, the Court of Appeals held (A18-A20) that all such evidence was inadmissible and should not have been considered by the trial court. The court's ruling on this issue indicates a total failure to grasp the significance of the issues in this case. The court's treatment of this issue also constitutes an erroneous view of Rules 401 and 404 of the Federal Rules of Evidence.

4. The Case Presents Important Questions of Substantial General Interest.

There is no doubt that professional football has become a major source of recreation and interest in this country. The very basis of the sport involves constant physical contact which might ordinarily be described as "assault and battery." The difference between deliberate striking on the football field and similar conduct on the streets seems obvious. The law in Colorado and elsewhere provides for these differences by utilizing concepts of consent and assumption of risk. The Court of Appeals unrealistically and erroneously treated this case as if it had involved two strangers on the street. If its opinion is allowed to stand uncorrected, the continuation of the game as it is presently known and enjoyed by millions of Americans will not be possible.

CONCLUSION

For the reasons stated above, petitioners Charles Clark and the Cincinnati Bengals, Inc. respectfully pray that this Court should grant their petition for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 77-1812

DALE HACKBART,
Plaintiff-Appellant,
v.
CINCINNATI BENGALS, INC., and CHARLES "BOOBY" CLARK,
Defendants-Appellees.

(Filed June 11, 1979)

Appeal from the United States District Court for the District of Colorado
(D.C. No. 75-M-437)

Mary Butler of Johnson & Mahoney, P.C., Denver, Colorado (Roger F. Johnson, on the brief), for Plaintiff-Appellant.

Robert G. Stachler of Taft, Stettinius & Hollister, Cincinnati, Ohio (William C. McClearn of Holland & Hart, Denver, Colorado, and Thomas T. Terp of Taft, Stettinius & Hollister, on the brief), for Defendants-Appellees.

Before DOYLE, McKAY and LOGAN, Circuit Judges.

DOYLE, Circuit Judge.

The question in this case is whether in a regular season professional football game an injury which is inflicted by one professional football player on an opposing player can give rise to liability in tort where the injury was inflicted by the intentional striking of a blow during the game.

The injury occurred in the course of a game between the Denver Broncos and the Cincinnati Bengals, which game was being played in Denver in 1973. The Bronco's defensive back, Dale Hackbart, was the recipient of the injury and the Bengals' offensive back, Charles "Booby" Clark, inflicted the blow which produced it.

By agreement the liability question was determined by the United States District Court for the District of Colorado without a jury. The judge resolved the liability issue in favor of the Cincinnati team and Charles Clark. Consistent with this result, final judgment was entered for Cincinnati and the appeal challenges this judgment. In essence the trial court's reasons for rejecting plaintiff's claim was that professional football is a species of warfare and that so much physical force is tolerated and the magnitude of the force exerted is so great that it renders injuries not actionable in court; that even intentional batteries are beyond the scope of the judicial process.

Clark was an offensive back and just before the injury he had run a pass pattern to the right side of the Denver Bronco's end zone. The injury flowed indirectly from this play. The pass was intercepted by Billy Thompson, a Denver free safety, who returned it to mid-field. The subject injury occurred as an aftermath of the pass play.

As a consequence of the interception, the roles of Hackbart and Clark suddenly changed. Hackbart, who

had been defending, instantaneously became an offensive player. Clark, on the other hand, became a defensive player. Acting as an offensive player, Hackbart attempted to block Clark by throwing his body in front of him. He thereafter remained on the ground. He turned, and with one knee on the ground, watched the play following the interception.

The trial court's finding was that Charles Clark, "acting out of anger and frustration, but without a specific intent to injure * * * stepped forward and struck a blow with his right forearm to the back of the kneeling plaintiff's head and neck with sufficient force to cause both players to fall forward to the ground." Both players, without complaining to the officials or to one another, returned to their respective sidelines since the ball had changed hands and the offensive and defensive teams of each had been substituted. Clark testified at trial that his frustration was brought about by the fact that his team was losing the game.

Due to the failure of the officials to view the incident, a foul was not called. However, the game film showed very clearly what had occurred. Plaintiff did not at the time report the happening to his coaches or to anyone else during the game. However, because of the pain which he experienced he was unable to play golf the next day. He did not seek medical attention, but the continued pain caused him to report this fact and the incident to the Bronco trainer who gave him treatment. Apparently he played on the specialty teams for two successive Sundays, but after that the Broncos released him on waivers. (He was in his thirteenth year as a player.) He sought medical help and it was then that it was discovered by the physician that he had a serious neck fracture injury.

Despite the fact that the defendant Charles Clark admitted that the blow which had been struck was not accidental, that it was intentionally administered, the trial court ruled as a matter of law that the game of professional football is basically a business which is violent in nature, and that the available sanctions are imposition of penalties and expulsion from the game. Notice was taken of the fact that many fouls are overlooked; that the game is played in an emotional and noisy environment; and that incidents such as that here complained of are not unusual.

The trial court spoke as well of the unreasonableness of applying the laws and rules which are a part of injury law to the game of professional football, noting the unreasonableness of holding that one player has a duty of care for the safety of others. He also talked about the concept of assumption of risk and contributory fault as applying and concluded that Hackbart had to recognize that he accepted the risk that he would be injured by such an act.

I.

THE ISSUES AND CONTENTIONS

1. Whether the trial court erred in ruling that as a matter of policy the principles of law governing the infliction of injuries should be entirely refused where the injury took place in the course of the game.

2. Did the trial court err in concluding that the employee was not vicariously liable for an activity for which he had not received express authorization?

3. Whether it was error to receive in evidence numerous episodes of violence which were unrelated to the case at bar, that is, incidents of intentional infliction of injury which occurred in other games.

4. Whether it was error for the trial court to receive in evidence unrelated acts on the part of the plaintiff.

5. The final issue is whether the evidence justifies consideration by the court of the issue of reckless conduct as it is defined in A.L.I. Restatement of the Law of Torts Second, § 500, because (admittedly) the assault and battery theory is not available because that tort is governed by a one-year statute of limitations.

II.

WHETHER THE EVIDENCE SUPPORTED THE JUDGMENT

The evidence at the trial uniformly supported the proposition that the intentional striking of a player in the head from the rear is not an accepted part of either the playing rules or the general customs of the game of professional football. The trial court, however, believed that the unusual nature of the case called for the consideration of underlying policy which it defined as common law principles which have evolved as a result of the case to case process and which necessarily affect behavior in various contexts. From these considerations the belief was expressed that even *intentional* injuries incurred in football games should be outside the framework of the law. The court recognized that the potential threat of legal liability has a significant deterrent effect, and further said that private civil actions constitute an important mechanism for societal control of human conduct. Due to the increase in severity of human conflicts, a need existed to expand the body of governing law more rapidly and with more certainty, but that this had to be accomplished by legislation and administrative regulation. The judge compared football to coal mining and railroading insofar

as all are inherently hazardous. Judge Matsch said that in the case of football it was questionable whether social values would be improved by limiting the violence.

Thus the district court's assumption was that Clark had inflicted an intentional blow which would ordinarily generate civil liability and which might bring about a criminal sanction as well, but that since it had occurred in the course of a football game, that it should not be subject to the restraints of the law; that if it were it would place unreasonable impediments and restraints on the activity. The judge also pointed out that courts are ill-suited to decide the different social questions and to administer conflicts on what is much like a battlefield where the restraints of civilization have been left on the sidelines.

We are forced to conclude that the result reached is not supported by evidence.

III.

WHETHER INTENTIONAL INJURY IS ALLOWED BY EITHER WRITTEN RULE OR CUSTOM

Plaintiff, of course, maintains that tort law applicable to the injury in this case applies on the football field as well as in other places. On the other hand, plaintiff does not rely on the theory of negligence being applicable. This is in recognition of the fact that subjecting another to unreasonable risk of harm, the essence of negligence, is inherent in the game of football, for admittedly it is violent. Plaintiff maintains that in the area of contributory fault, a vacuum exists in relationship to intentional infliction of injury. Since negligence does not apply, contributory negligence is inapplicable. Intentional or reckless contributory fault could theoretically at least apply

to infliction of injuries in reckless disregard of the rights of others. This has some similarity to contributory negligence and undoubtedly it would apply if the evidence would justify it. But it is highly questionable whether a professional football player consents or submits to injuries caused by conduct not within the rules, and there is no evidence which we have seen which shows this. However, the trial court did not consider this question and we are not deciding it.

Contrary to the position of the court then, there are no principles of law which allow a court to rule out certain tortious conduct by reason of general roughness of the game or difficulty or administering it.

Indeed, the evidence shows that there are rules of the game which prohibit the intentional striking of blows. Thus, Article 1, Item 1, Subsection C, provides that:

> All players are prohibited from striking on the head, face or neck with the heel, back or side of the hand, wrist, forearm, elbow or clasped hands.

Thus the very conduct which was present here is expressly prohibited by the rule which is quoted above.

The general customs of football do not approve the intentional punching or striking of others. That this is prohibited was supported by the testimony of all of the witnesses. They testified that the intentional striking of a player in the face or from the rear is prohibited by the playing rules as well as the general customs of the game. Punching or hitting with the arms is prohibited. Undoubtedly these restraints are intended to establish reasonable boundaries so that one football player cannot intentionally inflict a serious injury on another. Therefore, the notion is not correct that all reason has been abandoned, whereby the only possible remedy for the person who has been the victim of an unlawful blow is retaliation.

IV.

WAS IT LEGALLY JUSTIFIABLE FOR THE TRIAL COURT TO HOLD, AS A MATTER OF POLICY, THAT JURISDICTION SHOULD NOT BE ASSUMED OVER THE CASE IN VIEW OF THE FACT THAT IT AROSE OUT OF A PROFESSIONAL FOOTBALL GAME?

A. Whether the theory of judicial restraint applies.

It is a well-settled principle of federal jurisdiction that where a federal court does not have a discretion to accept or reject jurisdiction, if it does not have jurisdiction, it will not take it, but it is ruled, on the other hand, that if it has jurisdiction it must take it. This principle has been expressed many times with perhaps one of the best expressions being found in an early opinion, that of Mr. Chief Justice Marshall in Cohens v. Virginia, 6 Wheat, 264, 404 (1821):

> It is most true, that this court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction, if it should. The judiciary cannot, as the legislature may, avoid a measure, because it approaches the confines of the constitution. We cannot pass it by, because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution. Questions may occur, which we would gladly avoid; but we cannot avoid them. All we can do is, to exercise our best judgment, and conscientiously to perform our duty. In doing this, in the present occasion, we find this tribunal invested with appellate jurisdiction in all cases arising under

> the constitution and laws of the United States. We find no exception to this grant, and we cannot insert one.

Much more recently the Supreme Court in the case of Willcox v. Consolidated Gas Co., 212 U.S. 19, 40 (1909), speaking through Mr. Justice Peckham, stated that where a federal court is appealed to in the case over which it has by law jurisdiction, it is its duty to take such jurisdiction.

> They assume to criticise that court [United States District Court for the Southern District of New York] for taking jurisdiction of this case, as precipitate, as if it were a question of discretion or comity, whether or not that court should have heard the case. On the contrary, there was no discretion or comity about it. When a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction (*Cohens v. Virginia*, 6 Wheat., 264, 404), and in taking it that court cannot be truthfully spoken of as precipitate in its conduct. That the case may be one of local interest only is entirely immaterial, so long as the parties are citizens of different states or a question is involved which by law brings the case within the jurisdiction of a Federal court. The right of a party plaintiff to choose a Federal court where there is a choice cannot be properly denied.

Mr. Justice Peckham expressed the view that the rule is based on the right of a party plaintiff to choose a federal court where there is a choice.

There are some recognized limitations on federal courts assuming jurisdiction, but none of these permit a court to exercise its own discretion on the subject. One example

of limitation is the political question. Another is the doctrine of abstention, which is exercised where a state court is involved and deference is exercised in favor of the state court. *See, for example,* Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976). These, however, are the exceptions and not the rule as was pointed out in the cited case. Abstention itself is limited. It does not contemplate that federal courts abdicate their jurisdiction. *See* American Trial Lawyers Association v. New Jersey Supreme Court, 409 U.S. 467 (1973).

The Supreme Court has been known to refuse to exercise its *original* jurisdiction. Ohio v. Wyandotte Chemicals Corporation, 401 U.S. 493 (1971). At the same time, it reiterated the traditional rule that where a federal court has jurisdiction it must exercise it. It is not at liberty to refuse to do so unless it is in accordance with one of the principles mentioned above. Original jurisdiction in the Supreme Court allows much more leeway to refusing acceptance of jurisdiction than does an inferior federal court.

It is clear that none of the grounds for refusing access to the courts are present in the instant case. One writer, Professor Keeton, has said that courts properly participate in the evolution and development of common law. We submit that this approach is at odds with refusing to accept the case. *See* Keeton, *Creative Continuity of Tort Law,* 75 Harv. L. Rev. 463 (1962). *See also* Widener, *Some Random Thoughts on Judicial Restraint,* 31 Wash. and Lee L. Rev. 505 (1974).[1]

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1. Judge Widener of the U.S. Court of Appeals for the Fourth Circuit concluded that if a problem exists it "is not to say that the federal courts must avoid all the hard, or unpleasant, or distasteful questions," but rather the limitations should be on the basis that jurisdiction prohibits the acceptance of the case. Since Congress prescribed jurisdiction, the boundaries set by it should be followed.

The spirit and the letter of the decisions is that if jurisdiction to hear or determine cases exists, as it does in the case at bar, the cause is to be tried on its merits.

The position which was adopted by the trial court in this case was then directly contrary to all of the law dealing with the exercise of jurisdiction by federal courts.

B. Whether diversity jurisdiction provides any discretion.

It is of high importance to note the fact that in a diversity of citizenship case the federal district court sits as a state trial court and applies the law of the forum state. *See* Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938). In this highly important decision the Supreme Court, through the late Justice Brandeis, overruled the early case of Swift v. Tyson, 16 Pet. 1 (1842), which had allowed federal trial courts to apply their own common law. The rule was established in *Erie* that the law of the state in which the court sat had to be applied to the diversity case. In rejecting the principle that the federal court could apply its own common law rule, the Court rejected the idea that a transcendental body of law existed for federal courts. It was said that there was no backup federal authority in the federal government to provide this power for federal courts; that the authoritative governing force was in the state courts.

Justice Holmes was quoted by Justice Brandeis (the author of *Erie*) for the proposition that the authority in this diversity area must come from the state. A second basis for disapproval of federal authority or ability to innovate in diversity cases also originated with Justice Holmes, who said that the *Swift v. Tyson* rule was an unconstitutional assumption of power by the courts of the United States. The Supreme Court in *Erie* thus declared that in applying the theory of *Swift v. Tyson,* the Supreme

Court and lower federal courts had invaded rights protected by the Constitution of the United States and the several states.

So, applying the *Erie* doctrine, the conclusion is that there exists not an independent basis which allows a federal court to, in effect, outlaw a particular activity absent legal evidence that either state policy or state law dictates or allows such action. Absent any such evidence, the trial court cannot turn to public policy in order to support a conclusion that the courts cannot entertain a particular case.

Second, it is also fundamental that for every injury wrongfully inflicted, some redress under the state common law must be afforded since it is essential that citizens be able to look to their government for redress. As was said in Marbury v. Madison, 1 Cr. (5 U.S.), 137, 163 (1803), "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the law, whenever he received an injury. One of the first duties of government is to afford that protection."

The right of citizens to get relief in federal courts is similar to the same right in state court, bearing in mind that the federal courts in diversity cases are applying state law. We must also be cognizant that federal courts are limited to deciding cases or controversies. This was pointed out in Flast v. Cohen, 392 U.S. 83, 94-95 (1968). The Court there said:

> those words limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process. And in part those words define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts

> will not intrude into areas committed to the other branches of government.

392 U.S. at 95.

The Court in *Flast* was recognizing the right of a federal taxpayer to enjoin the spending of federal funds for the buying of books for use in religious schools. 392 U.S. at 105-06.

The concurrence of Justice Douglas is worth noting, for he spoke on the right of access to the courts as follows:

> The judiciary is an indispensable part of the operation of our federal system. With the growing complexities of government it is often the one and only place where effective relief can be obtained. If the judiciary were to become a super-legislative group sitting in judgment on the affairs of people, the situation would be intolerable. But where wrongs to individuals are done by violation of specific guarantees, it is abdication for the courts to close their doors.

392 U.S. at 111.

C. Does Colorado law provide or allow any restraint?

The next question is whether there are applicable restrictions in the Colorado law. On the contrary, the Colorado Constitution, Art. II, § 6, provides: "Court of justice shall be open to every person, and a speedy remedy afforded for every injury to person, property or character; and right and justice should be administered without sale, denial or delay." The district courts are said to be courts of unlimited jurisdiction unlike the federal courts. However, in a diversity case the federal court inherits the jurisdictional scope that is enjoyed by the state court within the district. Art. VI, § 9, subsection (1), provides:

> The district courts shall be trial courts of record with general jurisdiction, and shall have original jurisdiction in all civil, probate, and criminal cases, except as otherwise provided herein, and shall have such appellate jurisdiction as may be prescribed by law.

The Colorado courts have liberally construed these provisions. See Patterson v. People, 23 Colo. App. 479, 130 P. 718 (1913); People ex rel. Cruz v. Morley, 77 Colo. 25, 234 P. 178 (1924). In the *Morley* case it was said: "[t]he constitutional jurisdiction of the district court is unlimited. It should not be limited without circumspection and no statute should be held to limit it unless it says so plainly * * *." 234 P. at 179.

The Colorado Supreme Court has held that under Art. II § 6 of the Colorado Constitution, where there exists a right under the law, the courts of the state will assure the protection of that right. O'Quinn v. Walt Disney Productions, Inc., 177 Colo. 190, 493 P.2d 344 (1972).

The common law, of course, obtains in Colorado. The legislature may modify it, but in the absence of evidence that the common law has been modified by legislation, the courts, that is, the district court and the federal district court in a diversity case, must apply it.

We are constrained to hold that the trial court's ruling that this case had to be dismissed because the injury was inflicted during a professional football game was error.

V.

IS THE STANDARD OF RECKLESS DISREGARD OF THE RIGHTS OF OTHERS APPLICABLE TO THE PRESENT SITUATION?

The Restatement of Torts Second, § 500, distinguishes between reckless and negligent misconduct. Reckless misconduct differs from negligence, according to the authors, in that negligence consists of mere inadvertence, lack of skillfulness or failure to take precautions; reckless misconduct, on the other hand, involves a choice or adoption of a course of action either with knowledge of the danger or with knowledge of facts which would disclose this danger to a reasonable man. Recklessness also differs in that it consists of intentionally doing an act with knowledge not only that it contains a risk of harm to others as negligence, but that it actually involves a risk substantially greater in magnitude than is necessary in the case of negligence. The authors explain the difference, therefore, in the degree of risk and the difference is so significant as to amount to a difference in time.

Subsection (f) also distinguishes between reckless misconduct and intentional wrongdoing. To be reckless the *act* must have been intended by the actor. At the same time, the actor does not intend to cause the harm which results from it. It is enough that he realized, or from the facts should have realized, that there was a strong probability that harm would result even though he may hope or expect that this conduct will prove harmless. Nevertheless, existence of probability is different from substantial certainty which is an ingredient of intent to cause the harm which results from the act.

Therefore, recklessness exists where a person knows that the act is harmful but fails to realize that it will produce the extreme harm which it did produce. It is in this respect that recklessness and intentional conduct differ in degree.

In the case at bar the defendant Clark admittedly acted impulsively and in the heat of anger, and even though it could be said from the admitted facts that he

intended the act, it could also be said that he did not intend to inflict serious injury which resulted from the blow which he struck.

In ruling that recklessness is the appropriate standard and that assault and battery is not the exclusive one, we are saying that these two liability concepts are not necessarily opposed one to the other. Rather, recklessness under § 500 of the Restatement might be regarded, for the purpose of analysis at least, a lesser included act.

Assault and battery, having originated in a common law writ, is narrower than recklessness in its scope. In essence, two definitions enter into it. The assault is an attempt coupled with the present ability to commit a violent harm against another. Battery is the unprivileged or unlawful touching of another. Assault and battery then call for an intent, as does recklessness. But in recklessness the intent is to do the act, but without an intent to cause the particular harm. It is enough if the actor knows that there is a strong probability that harm will result. Thus, the definition fits perfectly the fact situation here. Surely, then, no reason exists to compel appellant to employ the assault and battery standard which does not comfortably apply fully in preference to the standard which meets this fact situation.

VI.

WHICH OF THE STATUTES OF LIMITATIONS APPLIES?

The appellees contend that Hackbart was guilty of an assault and battery, if he was guilty of anything; that this is barred by the applicable statute of limitations for a one-year period. Appellant, however, contends that the injury was the result of reckless disregard of the rights of the

plaintiff and that the six-year statute provided in Colo. Rev. Stat. Ann. § 13-80-110, is applicable.

Our court in the recent decision in Zuniga v. Amfac Foods, Inc., 580 F.2d 380 (10th Cir. 1978), adopted the position that actions in tort are governed by the six-year provision in the cited statute. It is also to be noted that Colorado fully recognizes the action of reckless disregard for the rights of others. *See* Pettingell v. Moede, 129 Colo. 484, 271 P.2d 1038 (1954); Fanstiel v. Wright, 122 Colo. 451, 222 P.2d 1001 (1950); Shoemaker v. Mountain States Tel. & Tel. Co., 559 P.2d 721 (Colo. App. 1976). The definitions contained in § 500 are fully applicable here, and the Colorado Supreme Court in Fanstiel v. Wright, *supra,* has adopted the definition contained in § 500. A Comment to the section discusses the distinctions which we have previously mentioned.

We conclude that if the evidence establishes that the injuries were the result of acts of Clark which were in reckless disregard of Hackbart's safety, it can be said that he established a claim which is subject to the six-year statute. The cause has not been tried on its merits, but there is substantial evidence before us that supports the notion that Clark did act in accordance with the tests and standards which are set forth in § 500, *supra.* We are not prejudging this issue of fact, but are merely saying that considered in a light favorable to the plaintiff, at this stage of the proceedings the hypothesis exists that would constitute a violation of § 500 and the appellant should be given an opportunity to offer his proofs in court on this subject.

VII.

DID THE COURT ERR IN RECEIVING IN EVIDENCE FILMS OF VIOLENCE THAT TOOK PLACE IN OTHER FOOTBALL GAMES REGARDLESS OF THE IDENTITY OF THE PLAYERS AND TEAMS?

There was a film of the actual injury suffered by plaintiff. It showed the sequence of events and also depicted the manner of infliction. Obviously we need not consider the relevancy of this.

There were incidents that were designed to show that the plaintiff Hackbart was a dirty player.

Finally, films were shown which depicted acts of violence between other players and other teams.

The Federal Rules of Evidence, Rule 401, define relevant evidence as follows:

> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Rule 404 deals with character evidence and other crimes. That which deals with character states as follows:

> (a) Character evidence generally. Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:
>
> (1) Character of accused. Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;
>
> (2) Character of victim. Evidence of a pertinent trait of character of the victim of the crime

> offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;
>
> (3) Character of witness. Evidence of the character of a witness, as provided in Rules 607, 608, and 609.

Subsection (b) of Rule 404 deals with other wrongs or acts and states the traditional rule that:

> (b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Unless the game of football is on trial, and it appeared to be in the case at bar, the acts of violence which occurred in other games and between other teams and players were without relevance. The view we take is that the game of football is not on trial, but, rather, the trial involves a particular act in one game.

Although we recognize that the trial court has a broad discretion in receiving or rejecting evidence along this line, we fail to see the relevancy of other acts which are unconnected with the incident being tried.

The other aspect, namely the proof of the character of the plaintiff by production of prior acts, would be admissible only if his character was an issue in the case. Unless the plaintiff was shown to have been an unlawful aggressor in the immediate incident, his prior acts could not be relevant. The indications from the picture of the

action here are that he threw a body block and after the lapse of some time, a short period of time, the blow was struck while Hackbart was down on his knee watching the action. Therefore, this evidence would appear to be questionable if not irrelevant.

On retrial the admissibility of prior unrelated acts should be very carefully considered and should not be received merely for the purpose of showing that the defendant himself had violated rules in times past since this is not per se relevant. Indeed it would be necessary for an issue to exist as to whether Hackbart was the aggressor in order for such evidence to be relevant.

* * * * * *

In sum, having concluded that the trial court did not limit the case to a trial of the evidence bearing on defendant's liability but rather determined that as a matter of social policy the game was so violent and unlawful that valid lines could not be drawn, we take the view that this was not a proper issue for determination and that plaintiff was entitled to have the case tried on an assessment of his rights and whether they had been violated.

The trial court has heard the evidence and has made findings. The findings of fact based on the evidence presented are not an issue on this appeal. Thus, it would not seem that the court would have to repeat the areas of evidence that have already been fully considered. The need is for a reconsideration of that evidence in the light of that which is taken up by this court in its opinion. We are not to be understood as limiting the trial court's consideration of supplemental evidence if it deems it necessary.

The cause is reversed and remanded for a new trial in accordance with the foregoing views.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 75 M 437

DALE HACKBART,
Plaintiff,
v.
CINCINNATI BENGALS, INC. and CHARLES "BOOBY" CLARK,
Defendants.

(Filed August 18, 1977)

Mr. Roger F. Johnson and Ms. Mary Butler, Johnson & Mahoney, P.C., 414 Hilton Office Building, 1515 Cleveland Place, Denver, Colorado 80202, attorneys for the plaintiff. Mr. William C. McClearn, Holland & Hart, 730 Seventeenth Street, Denver, Colorado 80202; Mr. Robert G. Stachler and Mr. Thomas T. Terp, Taft, Stettinius & Hollister, 600 Dixie Terminal Building, Cincinnati, Ohio 45202, attorneys for the defendants.

FINDINGS, CONCLUSIONS AND ORDER

MATSCH, Judge

Jurisdiction over this civil action is based upon diversity of citizenship pursuant to 28 U.S.C. § 1332. By agreement of the parties, a separate trial to the court was held on the question of liability, with issues of damages

and causation reserved. The case arises as a result of an incident which occurred in the course of a professional football game played between the Denver Broncos and the Cincinnati Bengals, in Denver, Colorado, on September 16, 1973.

The Parties

The plaintiff, Dale Hackbart, is a citizen of Colorado who was a 35 year old contract player for the Denver Broncos Football Club in the National Football League at the time of the incident. He was then 6 feet 3 inches tall and weighed 210 pounds. Mr. Hackbart had 13 years' experience as a professional football player after competing in college and high school football, making a total of 21 years of experience in organized football.

The Denver game was the first regular season professional football game for the defendant, Charles Clark, who was then 23 years old with a weight of 240 pounds and a height of 6 feet 1 3/4 inches. Mr. Clark was a contract player for the Cincinnati Bengals Football Club, Inc., defendant herein, which was also a member of the National Football League. Both defendants are citizens of states other than Colorado.

The Incident

The incident which gave rise to this lawsuit occurred near the end of the first half of the game at a time when the Denver team was leading by a score of 21 to 3. Dale Hackbart was playing a free safety position on the Broncos' defensive team and Charles Clark was playing fullback on the Bengals' offensive team. The Cincinnati team attempted a forward pass play during which Charles Clark ran into a corner of the north end zone as a prospective receiver. That took him into an area which was

the defensive responsibility of Mr. Hackbart. The thrown pass was intercepted near the goal line by a Denver linebacker who then began to run the ball upfield. The interception reversed the offensive and defensive roles of the two teams. As a result of an attempt to block Charles Clark in the end zone, Dale Hackbart fell to the ground. He then turned and, with one knee on the ground and the other leg extended, watched the play continue upfield. Acting out of anger and frustration, but without a specific intent to injure, Charles Clark stepped forward and struck a blow with his right forearm to the back of the kneeling plaintiff's head with sufficient force to cause both players to fall forward to the ground. Both players arose and, without comment, went to their respective teams along the sidelines. They both returned to play during the second half of the game.

Because no official observed it, no foul was called on the disputed play and Dale Hackbart made no report of this incident to his coaches or to anyone else during the game. Mr. Hackbart experienced pain and soreness to the extent that he was unable to play golf as he had planned on the day after the game. He did not seek any medical attention and, although he continued to feel pain, he played on specialty team assignments for the Denver Broncos in games against the Chicago Bears and the San Francisco Forty-Niners on successive Sundays. The Denver Broncos then released Mr. Hackbart on waivers and he was not claimed by any other team. After losing his employment, Mr. Hackbart sought medical assistance, at which time it was discovered that he had a neck injury. When that information was given to the Denver Broncos Football Club, Mr. Hackbart received his full payment for the 1973 season pursuant to an injury clause in his contract.

The Professional Football Industry

The claim of the plaintiff in this case must be considered in the context of football as a commercial enterprise. The National Football League (NFL) is an organization formed for the purpose of promoting and fostering the business of its members, the owners of professional football "clubs" with franchises to operate in designated cities. The Denver Broncos Football Club is a trade name for Rocky Mountain Empire Sports, Inc., a Colorado corporation. The league has a constitution and bylaws which provide for substantial control of the franchisees by league officers and committees. All NFL players as employees of the member clubs are required to sign a standard form of player contract prescribed by the league.

The National Football League Players' Association is an unincorporated association which is the sole and exclusive bargaining representative of all professional football players in the NFL as a labor organization under the National Labor Relations Act. A collective bargaining contract between that association and the National Football League Player Relations Association, as bargaining agent for the member clubs, was in effect during 1973. The agreement includes adoption of the standard player contract form and covers other terms and conditions of employment, including an injury grievance procedure to resolve disputes between a player and his employer. There is no provision for disputes between players of different teams.

Football is a recognized game which is widely played as a sport. Commonly teams are organized by high schools and colleges and games are played according to rules provided by associations of such schools.

The basic design of the game is the same at the high school, college and professional levels. The differences are largely reflective of the fact that at each level the players have increased physical abilities, improved skills and differing motivations.

Football is a contest for territory. The objective of the offensive team is to move the ball through the defending team's area and across the vertical plane of the goal line. The defensive players seek to prevent that movement with their bodies. Each attempted movement involves collisions between the bodies of offensive and defensive players with considerable force and with differing areas of contact. The most obvious characteristic of the game is that all of the players engage in violent physical behavior.

The rules of play which govern the method and style by which the NLF teams compete include limitations on the manner in which players may strike or otherwise physically contact opposing players. During 1973, the rules were enforced by six officials on the playing field. The primary sanction for a violation was territorial with the amounts of yardage lost being dependent upon the particular infraction. Players were also subject to expulsion from the game and to monetary penalties imposed by the league commissioner.

The written rules are difficult to understand and, because of the speed and violence of the game, their application is often a matter of subjective evaluation of the circumstances. Officials differ with each other in their rulings. The players are not specifically instructed in the interpretation of the rules, and they acquire their working knowledge of them only from the actual experience of enforcement by the game officials during contests.

Many violations of the rules do occur during each game. Ordinarily each team receives several yardage penalties, but many fouls go undetected or undeclared by the officials.

Disabling injuries are also common occurrences in each contest. Hospitalization and surgery are frequently required for repairs. Protective clothing is worn by all players, but it is often inadequate to prevent bodily damage. Professional football players are conditioned to "play with pain" and they are expected to perform even though they are hurt. The standard player contract imposes an obligation to play when the club physician determines that an injured player has the requisite physical ability.

The violence of professional football is carefully orchestrated. Both offensive and defensive players must be extremely aggressive in their actions and they must play with a reckless abandonment of self-protective instincts. The coaches make studied and deliberate efforts to build the emotional levels of their players to what some call a "controlled rage."

John Ralston, the 1973 Broncos coach, testified that the pre-game psychological preparation should be designed to generate an emotion equivalent to that which would be experienced by a father whose family had been endangered by another driver who had attempted to force the family car off the edge of a mountain road. The precise pitch of motivation for the players at the beginning of the game should be the feeling of that father when, after overtaking and stopping the offending vehicle, he is about to open the door to take revenge upon the person of the other driver.

The large and noisy crowds in attendance at the games contribute to the emotional levels of the players. Quick

changes in the fortunes of the teams, the shock of violent collisions and the intensity of the competition make behavioral control extremely difficult, and it is not uncommon for players to "flare up" and begin fighting. The record made at this trial indicates that such incidents as that which gave rise to this action are not so unusual as to be unexpected in any NFL game.

The end product of all of the organization and effort involved in the professional football industry is an exhibition of highly developed individual skills in coordinated team competition for the benefit of large numbers of paying spectators, together with radio and television audiences. It is appropriate to infer that while some of those persons are attracted by the individual skills and precision performances of the teams, the appeal to others is the spectacle of savagery.

Plaintiff's Theories of Liability

This case is controlled by the law of Colorado. While a theory of intentional misconduct is barred by the applicable statute of limitations, the plaintiff contends that Charles Clark's foul was so far outside of the rules of play and accepted practices of professional football that it should be characterized as reckless misconduct within the principles of Section 500 of the *Restatement of Torts*, 2d. Those principles have been recognized in Colorado in *Fanstiel v. Wright*, 122 Colo. 451, 222 P.2d 1001 (1950) and *Coffman v. Godsoe*, 142 Colo. 575, 351 P.2d 808 (1960). A reckless disregard for the safety of a goalkeeper in a schoolboy soccer game was the basis for recovery in *Nabozny v. Barnhill*, 31 Ill. App. 3rd 212, 334 N.E.2d 258 (1975).

Alternatively, the plaintiff claims that his injury was at least the result of a negligent act by the defendant.

The difference in these contentions is but a difference in degree. Both theories are dependent upon a definition of a duty to the plaintiff and an objective standard of conduct based upon the hypothetical reasonably prudent person. Thus, the question is what would a reasonably prudent professional football player be expected to do under the circumstances confronting Charles Clark in this incident?

Two coaches testified at the trial of this case. Paul Brown has had 40 years of experience at all levels of organized football, with 20 years of coaching professional football. Both Mr. Brown and Mr. Ralston emphasized that the coaching and instructing of professional football players did not include any training with respect to a responsibility or even any regard for the safety of opposing players. They both said that aggressiveness was the primary attribute which they sought in the selection of players. Both emphasized the importance of emotional preparation of the teams. Mr. Brown said that flareup fighting often occurred, even in practice sessions of his teams.

It is wholly incongruous to talk about a professional football player's duty of care for the safety of opposing players when he has been trained and motivated to be heedless of injury to himself. The character of NFL competition negates any notion that the playing conduct can be circumscribed by any standard of reasonableness.

Both theories of liability are also subject to the recognized defenses of consent and assumption of the risk. Here the question is what would a professional football player in the plaintiff's circumstances reasonably expect to encounter in a professional contest?

All of the witnesses with playing or coaching experience in the NFL agreed that players are urged to avoid penalties. The emphasis, however, is on the unfavorable effects of the loss of yardage, not the safety of the players. It is undisputed that no game is without penalties and that players frequently lose control in surges of emotion.

The conflict in the testimony is the difference in the witnesses' opinions as to whether Mr. Clark's act of striking the plaintiff on the back of the head in reaction to anger and frustration can be considered as "a part of the game." Several former players denounced this incident and said that Mr. Clark's conduct could not be considered customary or acceptable.

It is noteworthy that while this incident was clearly shown on the Denver Broncos' defensive game films, which were routinely reviewed by the defensive players and coaching staff, none of them made it a matter of special attention or concern.

Upon all of the evidence, my finding is that the level of violence and the frequency of emotional outbursts in NFL football games are such that Dale Hackbart must have recognized and accepted the risk that he would be injured by such an act as that committed by the defendant Clark on September 16, 1973. Accordingly, the plaintiff must be held to have assumed the risk of such an occurrence. Therefore, even if the defendant breached a duty which he owed to the plaintiff, there can be no recovery bcause of assumption of the risk.

The plaintiff has also claimed that he is a beneficiary of a contract made for his protection. That is based on a provision of the standard player contract whereby the player agrees to conform to the rules and regulations of the NFL. Thus, it is argued that the rules of play include

safety rules for the benefit of opposing players. That is a strained interpretation of the contractual provisions. In context, the rules and regulations referred to are those relating to the employment relationship and not the conduct of play. To hold otherwise would create a potential for contract liability for every infraction of every playing rule.

The plaintiff asserts that Mr. Clark was guilty of outrageous conduct. That doctrine is inapplicable to this case. Outrageous conduct has been the basis for liability where severe emotional distress resulted from some behavior which was considered to be so extraordinary and so far from societal norms as to be regarded as atrocious and utterly intolerable. Section 46, *Restatement of Torts*, 2d; *Rugg v. McCarty*, 173 Colo. 170, 476 P.2d 753 (1970). Dale Hackbart did not suffer such emotional distress and Charles Clark's action was not outside applicable norms of NFL football.

Finally, plaintiff seeks recovery on a theory of an interference with contract. That tort was defined in *Comtrol, Inc. v. Mountain States Telephone & Telegraph Co.*, 32 Colo. App. 384, 513 P.2d 1082 (1973) to include an intent to cause a breach of contract and some action which does induce a breach as necessary elements. Neither is shown in the evidence in this case. The Denver Broncos fully performed the Hackbart contract and an intent to interfere with it was certainly not what caused the blow by Charles Clark.

Liability of the defendant Cincinnati Bengals, Inc. is based upon a contention that the Bengals failed to instruct and control their rookie fullback. The record, however, reflects that what he did is, unfortunately, an example of the excesses of violence which have become expectable

as a result of the style of play in the NFL. The question of liability of the employer under the doctrine of respondeat superior is not presented because Charles Clark is not liable to the plaintiff.

The Application of Tort Principles to Professional Football—A Question of Social Policy

> The business of the law of torts is to fix the dividing line between those cases in which a man is liable for harm which he has done, and those in which he is not. Justice O. W. Holmes, *The Common Law* (1881).

While the foregoing findings of fact and conclusions of law are determinative of the claim made by Dale Hackbart against Charles Clark and his employer, this case raises the larger question of whether playing field action in the business of professional football should become a subject for the business of the courts.

To compensate the injured at the expense of the wrongdoer, the courts have been compelled to construct principles of social policy. Through the processes of trial and error the judicial branch of government has historically evolved the common law principles which necessarily affect behavior in many contexts. The potential threat of liability for damages can have a significant deterrent effect and private civil actions are an important mechanism for societal control of human conduct. In recent years the pace of technical progress has accelerated and human conflicts have intensified. The resulting need to expand the body of governing law with greater rapidity and certainty than can be achieved through the litigation process has been met by legislation and administrative regulation. That is particularly true of industrial injuries. The coal

mines became subject to the Federal Coal Mine Safety Act. The railroads have long been governed by the Federal Employers Liability Act and the Safety Appliance Act. The Occupational Health and Safety Act has broad application.

To this time professional football has been a self-regulated industry. The only protection which NFL contract players have beyond self-defense and real or threatened retaliation is that which is provided by the league rules and sanctions. It may well be true that what has been provided is inadequate and that these young athletes have been exploited and subjected to risks which should be unacceptable in our social order. In this respect, it is interesting to compare football with boxing. Because of the essential brutality of the contest, prize fighting has been held to be unlawful unless conducted under the sanction and authority of a governmental commission. *Antlers Athletic Association v. Hartung*, 85 Colo. 125, 129, 274 P. 831 (1929). See C.R.S. (1973) §§ 12-10-101 *et seq.**

Football has been presumed to be lawful and, indeed, professional football has received the implicit approval of government because these contests take place in arenas owned by local governments and the revenues are subject to taxation. Like coal mining and railroading, professional football is hazardous to the health and welfare of those who are employed as players.

What is the interest of the larger community in limiting the violence of professional football? That question concerns not only the protection of the participants, but also the effects of such violence on those who observe

*Professional boxing was apparently legalized, without regulation, by a repeal of the cited statute by Senate Bill No. 418, effective July 1, 1977.

it. Can the courts answer this question? I think not. An ordinary citizen is entitled to protection according to the usages of the society in which he lives, and in the context of common community standards there can be no question but that Mr. Clark's blow here would generate civil liability. It would involve a criminal sanction if the requisite intent were present. The difference here is that this blow was delivered on the field of play during the course of action in a regularly scheduled professional football game. The Illinois court was concerned with the safety of high school athletes in *Nabozny v. Barnhill, supra,* at 260 and said:

> This court believes that the law should not place unreasonable burdens on the free and vigorous participation in sports by our youth. Organized, athletic competition does not exist in a vacuum. Rather, some of the restraints of civilization must accompany every athlete onto the playing field. One of the educational benefits of organized athletic competition to our youth is the development of discipline and self control.

The difficulty with that view as applied to professional football is that to decide which restraints should be made applicable is a task for which the courts are not well suited. There is no discernible code of conduct for NFL players. The dictionary definition of a sportsman is one who abides by the rules of a contest and accepts victory or defeat graciously. *Webster's Third New International Dictionary*, p. 2206 (1971). That is not the prevalent attitude in professional football. There are no Athenian virtues in this form of athletics. The NFL has substituted the morality of the battlefield for that of the playing field, and the "restraints of civilization" have been left on the sidelines.

Mr. Justice Holmes' simple statement of the function of tort law and the evidentiary record now before me clearly reveal the density of the thicket in which the courts would become entangled if they undertook the task of allocation of fault in professional football games. The NFL rules of play are so legalistic in their statement and so difficult of application because of the speed and violence of the play that the differences between violations which could fairly be called deliberate, reckless or outrageous and those which are "fair play" would be so small and subjective as to be incapable of articulation. The question of causation would be extremely difficult in view of the frequency of forceful collisions. The volume of such litigation would be enormous and it is reasonable to expect that the court systems of the many states in which NFL games are played would develop differing and conflicting principles of law. It is highly unlikely that the NFL could continue to produce anything like the present games under such multiple systems of overview by judges and juries. If there is to be any governmental involvement in this industry, it is a matter which can be best considered by the legislative branch.

My conclusion that the civil courts cannot be expected to control the violence in professional football is limited by the facts of the case before me. I have considered only a claim for an injury resulting from a blow, without weaponry, delivered emotionally without a specific intent to injure, in the course of regular play in a league-approved game involving adult, contract players. Football as a commercial enterprise is something quite different from athletics as an extension of the academic experience and what I have said here may have no applicability in other areas of physical competition.

Upon the foregoing findings of fact and conclusions of law, it is

ORDERED that judgment shall enter for the defendants, with costs to be taxed.

Dated: August 18, 1977.

BY THE COURT:

/s/ Richard P. Matsch
Richard P. Matsch, Judge
United States District Court